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Glade Leon Parduhn and University Texaco v. Natalie Buchi Bennett, et al. : Unknown

Utah Supreme Court

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.
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SUPREME COURT

STATE OF UTAH

GLADE LEON PARDUHN and UNIVERSITY TEXACO, Appellants, **vs.** NATALIE BUCHI BENNETT, et al., Appellees.	**REPLY BRIEF OF THE APPELLANT, GLADE PARDUHN** No.20030551-SC

On Appeal from a Judgment entered by the
Third Judicial District Court, Summit County
Judge Bruce Lubeck

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Priority Classification 15

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STATUTES

UTAH RULES OF CIVIL PROCEDURE

REPLY TO APPELLEES' STATEMENT OF FACTS

Re: Joanne Statement No. 2 (Brief at 12):

The policy on Brad's life named Glade as the beneficiary. Question 31(f) on the application asked, "State purpose of insurance and nature of Owner's insurable interest." The applicants, Brad and Glade, answered, "Buy Sell/Partner." They did not answer "Buy/Sell Partner." The first and actual answer suggests the applicants had a dual intention. The agent who took the applications, Sheldon Hansen, testified that he was authorized to take the applications by the partners because they were partners, even had no buy-sell agreement existed. Trial Transcript, pp. 137-141.

Re: JoAnne Statement No. 3 (Brief at 12-13); Buchi Children's Statement No. 13 (Brief at 11):

On July 14, 1997, the partnership sold its two stations (real property and buildings) to Blackett Oil Company. See Plaintiff's Trial Exhibit 11. The partnership did no business after that date. The partnership, however, did not sell all its assets including personal property to Blackett Oil and there was no evidence to that effect received at trial. See Plaintiff's Objection to Proposed Findings of Fact and Conclusions of Law (June 5, 2003) pp. 4-5 and Exhibit A.[1] In response to Glade's

[1]The trial court declined to sign the Findings of Fact and the Conclusions of Law that the defendants proposed. Ruling and Order, June 18, 2003.

objection, the trial court vacated its prior "finding" that University Texaco's sale to Blackett Oil included all its personal property. Ruling and Order (June 18, 2003).

Re: JoAnne Statement No. 4 (Brief at 13):

JoAnne states that "Buchi and Parduhn had a fairly loose business arrangement." Although Glade is not sure what this means, the testimony at pages 23 and 55 of the trial transcript do not support it.

Re: Joanne Statement No. 7 (Brief at 13):

Glade's testimony was that he understood that if the partnership was dissolved because of a partner's death (it was not), then the surviving partner after the 1984 Amendment would be obligated under the buy-sell agreement to pay $100,000 received from insurance proceeds to the deceased partner's survivors. Trial testimony (Parduhn), pp. 28-29, 43-44. Glade did not testify that he understood his potential obligation under the buy-sell agreement to be $300,000, as JoAnne's statement implies. He understood it to be, at most, $100,000.

Re: JoAnne Statements No. 20-22 (Brief at 17):

An accounting by the partnership during its winding-up phase was not a subject of the August 2001 trial. The partnership, furthermore, was not a party at that time. As surviving partner, Glade did take charge of winding up the affairs of the partnership, as authorized by Utah Code Ann. § 48-1-34. The trial court, following the August 2001 trial, agreed that Parduhn had the legal authority to do so. Memorandum Decision

(August 27, 2001) at 3. Section 48-1-34 does not require that Glade have consulted with the deceased partner's heirs or obtained their approval, as is implied. The partnership had to defend two additional lawsuits and paid judgments entered in those matters. Trial Testimony (Parduhn) pp. 38-39 (identifying actions brought by Guardian State Bank and Republic Leasing).

Re: Buchi Children's Statement No. 8 (Brief at 10):

It is stated that the "intent was that Brad Buchi's wife and two children would receive $300,000 if he were to pass away." This was not Glade's intent and he testified to the contrary. Trial Testimony (Parduhn) pp. 28-29, 43-44. The attribution is to non-partner Lissa Buchi's testimony (pp. 102-106). Moreover, each time Lissa was asked her understanding of how the $300,000 proceeds were to be distributed if Brad died, Glade's objection to the question asked was sustained. See p. 103 (lines 5-17); p. 106 (lines 2-8).[2]

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[2]Lissa went on to claim that the trial court (J. Murphy) in her divorce had decreed that the proceeds of the $300,000 Northern policy were to be kept unencumbered and were to go to her children. Trial Testimony, pp. 106-107. Judge Lubeck, however, explicitly disregarded this testimony. Memorandum Decision (August 27, 2001) at 2. The decrees entered in her divorce contain no such holding, although they do refer to a Midland policy. Plaintiff's Trial Exhibit 21, ¶ 7. Moreover, the court in the divorce could not have imposed restraints on a policy that Glade, not Brad, owned.

Re: Buchi Children's Statement No. 10 (Brief at 10):

It is stated that "the partners routinely paid personal debts out of [the partnership] account, such as house payments, car payments and other personal obligations." This statement is attributed to Glade's testimony at page 47. No such trial testimony is reported, at least not at that page.

ARGUMENT

A. Overview.

At page 38 of her Brief, JoAnne Buchi urges the Supreme Court to "reject Parduhn's never ceasing efforts to deny this family the life insurance proceeds Brad Buchi intended them to get." This is, at least, an overreaching aspersion, given that in the application for the life insurance policy at issue Brad Buchi explicitly designated Glade Parduhn to be the sole beneficiary of the proceeds payable on his death, should he die. Brad also agreed that Glade would own the policy.

Brad did not name his wife, Lissa, as the beneficiary. He did not name his children as the beneficiary.[3] He certainly did not name JoAnne Buchi as the

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[3]The evidence clearly indicates that in those instances where Brad "intended" to provide for his family by the purchase of life insurance, he purchased separate life insurance for that purpose and explicitly designated his wife and children as the beneficiary of those policies. Thus, in 1989, Brad applied for an additional Northern policy to benefit his wife (Lissa, not JoAnne) and children separate from the two policies he and Glade purchased on each other's life. Plaintiff's Trial Exhibit 5. At the time, Brad's life was also insured by a $572,000 Executive Life policy, which designated Lissa Buchi and family as beneficiary. Plaintiff's Trial Exhibit 3 (Application, Question 18); Trial Testimony (S. Hansen), pp. 144-147;

beneficiary[4], whom he would not marry until after he later divorced Lissa. Nor did Brad name the partnership as beneficiary.

The best and only competent evidence of whom Brad in 1989 **intended** to have the proceeds of Northern Policy No. NL00989085 should he die, is that person whom he concurred be designated the beneficiary of proceeds payable under that policy. On that one policy, Brad appointed his partner, Glade Parduhn, as the person who was to receive all the proceeds of insurance payable on his death.[5] The Supreme Court in its decision

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Trial Testimony (Lissa Buchi), pp. 116-118. Brad's life in 1989 was insured in the additional amount of $200,000, by still another, earlier purchased policy from Northern. Plaintiff's Trial Exhibit 3 (Application, Question 18). Brad's life was also insured by Midland Life for $100,000, which the court in Brad and Lissa's divorce (decree entered 1992) ordered be maintained for the benefit of Brad's minor children. Trial Testimony (Lissa Buchi), pp. 119-120; Plaintiff's Trial Exhibit 21, p. 5.

[4]JoAnne's Addendum at Tab No. 10 includes a Stipulation from Brad and JoAnne's divorce. This Stipulation was not an exhibit at trial. To the best of counsel's knowledge, this is the first time this document has been revealed. It is nonetheless interesting, because it establishes that a year prior to his death Brad agreed to maintain insurance on his life in the amount of $100,000 and designate JoAnne as the beneficiary of that policy. ¶¶ 8-9. This exhibit, if anything, establishes Brad's intention to provide for JoAnne in the event of his death by purchasing life insurance that expressly named her as the beneficiary. It contradicts JoAnne's contemporary argument that Brad intended (which she argues is the basis of an award in equity) her to have the benefits of an insurance policy that did not name her as a beneficiary, and which was purchased three years before Brad married her.

[5]In response to Question 13A of the application for insurance, the applicants (Glade and Brad) designated "Glade Leon Parduhn" to be the beneficiary and described Glade's relationship to Brad as "partner." The cover page of policy No. NL00989085 states:

in this case on September 6, 2002, held that Brad's and Glade's, and the policy's designation of Glade as the beneficiary was clear and unambiguous. Absent compelling evidence and rationale to the contrary, "the designated beneficiary in a policy of insurance is entitled to the entire proceeds on maturity of the contract." Zolintakis v. Orfanos, 119 F.2d 571 (10th Cir.) (interpreting Utah law), cert. denied 62 S.Ct. 62, 314 U.S. 630, 86 L. Ed. 506 (1941).

Although contractually entitled to receive all insurance benefits payable on Brad's death, Glade would have been required by a second contract, a prior buy-sell agreement between Glade and Brad, to pass through $100,000 to Brad's wife and "survivors" had the buy-sell agreement survived the dissolution of the partnership. In return for the $100,000 paid (less possibly offsets for what Brad owed Glade), Glade would have received Brad's 50% interest in the partnership and its assets. The Supreme Court, consistent with decisions in other states, held, however, that the buy-sell agreement did not survive the dissolution of the partnership on July 14, 1997.[6] Hence, it was unenforceable by Brad's survivors.

> We will pay the proceeds if we receive due written proof that the Insured died while this policy was in force. **Payment will be made to the Beneficiary named in the application . . . .**

See Plaintiff's Trial Exhibit 3.

[6]The partnership's dissolution preceded Brad's death by approximately two-and-a-half to three weeks.

Had the Supreme Court's September 2002 analysis stopped here, all the life insurance proceeds would have been, by contract, payable to Glade. He would have no contractual obligation to pay over to Brad's "survivors" $100,000, or any other portion of the proceeds, per his and Brad's buy-sell agreement as amended in 1984. Brad's "survivors," however, would not necessarily have been left out of the equation: the affairs of the partnership would have been "wound up" consistent with state partnership law; after payment of partnership debts a final accounting would have been made and the distributions to partners would have been determined; and Brad's share would have been paid to his estate.[7] In re Estate of Brad Kevin Buchi, Third District Court (Salt Lake County), Probate Case No. 973901394. Brad's heirs, who include second wife JoAnne, would have divided any sum remaining after payment of approved claims against the estate filed by Brad's creditors.

As part of its September 6, 2002 decision, however, a majority of the Supreme Court decided that Glade, by virtue of Utah Code Ann. § 31A-21-104, had "lost" his insurable interest in Brad's life when the partnership was dissolved just prior to Brad's

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[7]JoAnne Buchi has charged that Glade Parduhn has dissipated the partnership's money. On the partnership's sale of its two stations in 1997, the proceeds went straight into an account at Associated Title. Monies, today, remain in that account at Associated Title and are drawing interest, subject to a final partnership accounting.

death.[8] There are several problems with this holding, the most significant of which is that JoAnne Buchi and Brad's children never pleaded the statute as an affirmative defense. The Supreme Court did not address and thus did not decide Glade's argument that the defense had been waived due to defendants' failure to plead it, even though he clearly made that argument to the trial court, clearly made it to the Supreme Court (Appellant's Brief, Jan. 24, 2002, at 7-39), and despite clear prior precedent that affirmative defenses based on statutes are waived if not pleaded. See e.g., Golding v. Ashley Central Irr. Co., 793 P.2d 897, 899 (Utah 1990); see also Utah R. Civ. P. 8(c), 12(b) and 12(h).

The Supreme Court's failure to decide Glade's argument that defendants' statutory defense had been waived was then compounded when the trial court, on remand, refused to consider any evidence other than what had been presented at trial on August 21, 2001 and entered a judgment awarding all the proceeds to the same persons it had before.

The trial court's determination that JoAnne and Brad's children were equitably entitled to the proceeds without taking additional evidence was error. It was error

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[8]According to virtually all authorities on the issue, including prior Utah case law, "insurable interest" in the life of an insured is determined when the insurance is purchased. It is not determined when the insured dies and the rights of a beneficiary are not impaired because the earlier relationship that established an insurable interest has been terminated. See Appellant's Brief at 53, n.18. There is no language in § 31A-21-104 that requires insurable interest to exist at any time other than when the insurance is purchased (i.e., when the interest is acquired).

because there was no reasonable notice to Glade in advance of the August 21, 2001 trial that the issue to be tried would be who was equitably entitled to the insurance proceeds, as opposed to who was entitled to them under the two contracts at issue. There was no adequate notice because the statute had not been pleaded as a defense.

B. An Award of the Insurance Proceeds to Defendants on Equitable Grounds Cannot be Supported Where a Defense Predicated on Section 31A-21-104 was Waived by Defendants' Failure to Plead it.

Is the holding stated by the Utah Supreme Court in Golding v. Ashley Central Irr. Co., 793 P.2d 897, 899 (Utah 1990), that an affirmative defense based on a statute is waived if it is not pleaded, still the law in Utah? If it is, then defendants' defense to Glade's contract claim should have been decreed waived.

On the merits and with the Golding case as precedent, it is difficult to understand how an affirmative defense based on §31A-21-104 cannot have been waived by the defendants' failure to plead it. Neither the statute nor an alleged "loss" of insurable interest was pleaded in defendants' Amended Answer. R.275. Neither was it ever mentioned in response to Glade's pretrial motions for summary judgment or partial summary judgment, nor in support of defendants' cross-motions for summary judgment. For that matter, it is a defense that Brad's children did not ever plead or mention prior to the August 2001 trial. Nor did they raise it in their Brief in the prior appeal. The defense was raised only by JoAnne; made for the first time in a reputed motion in limine filed only weeks prior to the December 2000 trial setting, and months after the deadline for

amendment of pleadings had passed. Glade immediately objected to JoAnne's belated presentation of this defense in the guise of a motion in limine and moved to strike on the ground that JoAnne had waived this defense by her failure to plead it. R.1147. JoAnne promptly withdrew her motion. R.1206. Its next mention was in JoAnne's Pretrial Brief, filed less than a week prior to the August 2001 trial, where it now was presented as the cornerstone of her entitlement argument. R.1295. Again, Glade moved to strike, R.1399, 1401, but his motion was denied. R.1412 (Lubeck, J.).

JoAnne invokes the law of the case doctrine in support of her position that the Supreme Court cannot revisit its earlier decision with regard to its earlier failure to address and rule on Glade's waiver argument. Specifically, she states that "the Supreme Court has decided the law of this case." Thus, she "should not be obliged to argue this issue once again." Brief at 39. Although JoAnne then goes on to provide her views concerning the merits of the statute, she, interestingly, makes no effort to contend that she pleaded the statute as an affirmative defense or that she did not waive the defense by her failure to plead it.

The "law of the case" doctrine is "a legal doctrine under which **a decision made on an issue** during one stage of a case is binding on successive stages of the same litigation." Thurston v. Box Elder County, 892 P.2d 1034, 260 Utah Adv. Rep. 22 (Utah 1995) (emphasis added); see also Plumb v. State, 809 P.2d 734, 739 (Utah 1990). The doctrine is usually applied at the trial court level. At the trial court level, a ruling by that

court, notwithstanding the doctrine, can be changed at any time prior to the entry of a final judgment if good cause exists to do so. Trembly v. Mrs. Fields Cookies, 884 P.2d 1306 (Utah App. 1994); Salt Lake City Corp. v. James Constructors, 761 P.2d 42, 44 (Utah App. 1988). Circumstances in which a trial court is warranted in reconsidering an earlier decision include if "manifest injustice" would result from a failure to reconsider a ruling and if "a court needs to correct its own errors." Trembly, supra at 1310; State v. O'Neil, 848 P.2d 694, 697 n.2 (Utah App.), cert. denied, 859 P.2d 585 (Utah 1993).

The Supreme Court, in Thurston, recognized that it possesses and retains authority to correct its own errors or oversight where a case has come to it on a second appeal. Correction is appropriate, for example, if the "court is convinced that its prior decision was clearly erroneous and would work a manifest injustice." Thurston, supra, 260 Utah Adv. Rep. at 13. Here, the Supreme Court on the first appeal apparently overlooked Parduhn's waiver argument; notwithstanding that it was clearly presented and argued to the court and clearly preserved for appeal by Glade's two motions to strike. The precedent that supports Glade's waiver argument is clear; and its very purpose is to prevent surprise and injustice.

The trial court (Lubeck, J.) ignored Golding and also Rules 8(c), 12(b), and 12(h) of the Utah Rules of Civil Procedure when on August 20, 2001 it denied Glade's motion to strike JoAnne's unpleaded affirmative defense. The trial court's denial of Glade's motion was error. It was of consequence, because it allowed a defense that was never

pleaded to become the eventual basis of a legal ruling that eviscerated contract rights that a majority of the Supreme Court, on the first appeal, decreed should have (except for the unpleaded statute) routed the proceeds to Glade. Under the facts of this case, given defendants' failure to plead the statute, this result is error, subverts the rules of civil procedure, and affects an injustice.

The law of the case doctrine, thus, should not preclude the Supreme Court from now deciding a threshold issue that it did not decide the first time this case was before it.

C. An Award of All the Life Insurance Proceeds Payable on Brad Buchi's Death, to JoAnne Buchi and Brad Buchi, under Northern Policy No. NL00989085, Cannot be Sustained on Equitable Grounds Where the August 21, 2001 Trial Did Not Fairly Contemplate a Trial Concerning Equitable Entitlement to the Proceeds and the Trial Court Refused to Consider Additional Evidence Relevant to Equity Proffered by Glade Parduhn.

The quagmire and confusion that has resulted in this case is exactly what Rules 8(c), 12(b) and 12(h) of the Rules of Civil Procedure and case law precedent headed by the Golding decision are intended to prevent: an adjudication of rights on legal theories and statutes not fairly contemplated by the parties going into a trial. An examination of the pleadings in this case and the memoranda filed in support of and in opposition to motions for summary judgment indicate that the August 2001 trial was to be a trial about contract rights: specifically those arising under a contract of life insurance and the partners' buy-sell agreement. Issues concerning the first included the deceased's alleged intent, alleged ambiguity of the contract of insurance, and what the terms of contract

provided. Concerning the latter, issues included whether the agreement survived the dissolution of the partnership and, if it did, whether it had been implicitly amended in amount from $100,000 to $300,000. Equitable entitlement, though, was not fairly contemplated.

The Appellees' response to this argument is to argue that all evidence relevant to an equitable distribution was considered at the trial held August 21, 2001, because the trial court judge said he had considered all the evidence concerning equity that he needed and desired to hear. Judge Lubeck stated, in his most recent decision, that his award based on equity was based only on evidence received at the earlier trial (even though his decision comments on "evidence" and "persuasive evidence" that was not presented at trial, but was introduced in the absence of evidentiary support in memoranda filed by defendants on remand). For example, defendants have made conclusory statements in memoranda and argument on remand concerning the special nature of the relationship between Brad and JoAnne (e.g., JoAnne's Brief at 25), although JoAnne's testimony at trial was limited to her date of marriage, that she was still married to Brad when he died, that she was the personal representative of Brad's estate, and that Brad did not leave a will. Had she gone any further; had she, for example, testified that her divorce proceeding versus Brad was about to be dismissed, that she and Brad were definitely going to re-establish the marital relationship and live on happily thereafter, or that Brad, as she now argues, "intended" her to have the

insurance proceeds of a policy purchased before he married her, then Glade would have offered evidence of impeachment under Rule 609, which he had earlier indicated he would in response to JoAnne's April 2001 motion in limine to exclude introduction of her felony convictions at trial. R.1242. The trial court did not grant JoAnne's motion in limine to exclude impeachment by use of her convictions at trial, as JoAnne now contends in her Brief at 27. Instead, the trial court judge took the motion and Glade's opposition under advisement and indicated he would rule on the motion if JoAnne's testimony put her credibility at issue. R.1260, 1412.

Findings of fact made by a trial court, in determining equitable claims and issues, are entitled to deference. There is a **presumption** that the findings are correct. A presumption of correctness, however, cannot be sustained where there exists material evidence that the trier-of-fact has refused to consider or where the appellant has not had fair opportunity to present material evidence.

The Supreme Court's ruling on September 6, 2002, assuming it to be correct, radically altered the focus of this case from contract issues to equity. Entitlement to the proceeds based solely on equity was not fairly contemplated as an issue to be tried by Glade Parduhn, going into the August 2001 trial, precisely because defendants had not timely pleaded a defense based on § 31A-21-104.

The trial court on remand could not, as it says it did, make a sound decision in equity based solely on evidence presented to it in the August 2001 trial, where it ignored

all contrary evidence that on remand Glade proffered, and where it divined intent from an agreement that the Supreme Court had held to be unenforceable.

D. Given the Supreme Court's September 6, 2002 Ruling, There Does Not Exist a Written Instrument Which Can Serve as the Basis for a Non-testamentary Transfer of the Insurance Proceeds Directly to JoAnne Buchi or Brad's children.

Calling it the "law of the case," Joanne insists that half the insurance proceeds go directly to her and that they bypass the partnership and, more to the point, Brad's estate. Brief at 25. Given JoAnne's fiduciary duty to the probate estate and its creditors, it is unclear how this Court and the trial court, on equitable grounds, can ignore her duty and condone her request that half the insurance proceeds be awarded to her, personally.

JoAnne's argument, furthermore, misrepresents the scope of the Ruling that Judge Stirba made on May 24, 2000 (and as later amended in response to Glade's motion for a "new trial"). Judge Stirba did not decree that the insurance proceeds, as a matter of law, were to pass one-half to JoAnne Buchi and half to Brad's children. She did find and rule that as of the date of Brad's death, JoAnne was still Brad's lawful wife, as a divorce decree had not yet been entered. With that marriage status as a premise, Judge Stirba held that any sum that might pass to JoAnne and to Brad's children per the partners' buy-sell agreement, if that agreement survived the partnership and remained enforceable, would be a non-testamentary transfer recognized by Utah Code Ann. § 75-6-201. The Supreme Court, however, held in deciding the earlier appeal that the

partnership was dissolved just prior to Brad's death and that the buy-sell agreement, therefore, did not survive dissolution. **A non-enforceable buy-sell agreement cannot be the basis of a non-testamentary transfer.**

A life insurance contract can be the conduit for a non-testamentary transfer, which will bypass an insured decedent's estate, as to the person the policy designates as the beneficiary of the contract. The Supreme Court, however, held that the contract of insurance unambiguously designated Glade as the beneficiary entitled to the proceeds of insurance.

A non-testamentary transfer, by law, must be based on a written instrument. Utah Code Ann. § 75-6-201. Given the Supreme Court's ruling on September 6, 2002, there is no written instrument capable of accomplishing that objective.

Brad's children, understandably, do not want to share any of the insurance proceeds with creditors of their father's estate. While JoAnne's reluctance is equally strong or stronger, it is less understandable and defensible given her position as the court-appointed personal representative of Brad's probate estate.

Glade contends that the proceeds should be awarded to him as the beneficiary due him under a contract of insurance, with no obligation to pass through a portion of those proceeds under a buy-sell agreement that did not survive dissolution of the partnership. If this Court, however, determines on the basis of § 31A-21-104 that the proceeds must be distributed to someone equitably entitled to them, then the proceeds should be

awarded to Glade. If not to Glade, they should be awarded to University Texaco. If not to University Texaco, then they should be awarded to Brad's estate. An equitable award cannot, however, bypass Brad's estate on the ground, as JoAnne now contends (Brief at 25), that the proceeds of insurance should go directly to her as a non-testamentary transfer. There is little basis in equity for bypassing Brad's estate and the creditors whose claims in that case have been approved. This Court should be especially careful in affirming and endorsing such a result, especially where the interests of the estate have not been articulated in this case and JoAnne, in her capacity as personal representative, has chosen instead to champion a position that is in her self-interest and contrary to the interests of the estate in probate.

CONCLUSION

Glade Parduhn respectfully asks that the ruling and decision of the trial court on remand be vacated and that the relief requested at page 64 of his Appellant's Brief be granted.

DATED this 16 day of March, 2004.

FISHBURN & ASSOCIATES, P.C.

By: _____

P. Bryan Fishburn, Esq.,
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CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing **REPLY BRIEF OF THE APPELLANT, GLADE PARDUHN** were mailed in the United States mail, first class postage prepaid, on the 17 day of March, 2004, to the following persons:

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